Supreme Court, U.S.
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No. 87-340

IN THE SUPREME COURT OF THE UNITED STATES

GERALD W. WYANT,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
and
BOROUGH OF NEWRY, PENNSYLVANIA,

Appellees

On Appeal from the Supreme
Court of Pennsylvania

MOTION OF APPELLEE, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant's failure to preserve a federal question before the Supreme Court of Pennsylvania calls for the Court to dismiss the appeal.

2. Whether, assuming a federal question has been preserved, the appeal presents grounds which are so unsubstantial as not to need further argument.

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PARTIES TO PROCEEDING BELOW

The parties before the Supreme Court of Pennsylvania included: 1) Gerald Wyant, appellant; 2) the Commonwealth of Pennsylvania, Department of Environmental Resources, appellee; and 3) the Borough of Newry, Blair County, Pennsylvania, appellee.

MOTION TO DISMISS OR AFFIRM

The Commonwealth of Pennsylvania, Department of Environmental Resources, moves the Court to dismiss the appeal on the ground that no federal question is presented or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

STATEMENT

Appellant, Gerald Wyant, appeals from a decision of the Supreme Court of Pennsylvania (Juris. State., A-3) which refused his petition for allowance of appeal from the Commonwealth Court of Pennsylvania. (Juris. State., A-16) Commonwealth Court had affirmed a decision of the Pennsylvania Environmental Hearing Board denying Wyant's request for leave to appeal out-of-time from a decision rendered by appellee, Department of Environmental Resources.

In November of 1983, appellee Borough of Newry (a municipality located in Blair County, Pennsylvania) adopted a revision to its official sewage disposal plan. (Juris. State., A-17) Notice of

the revision was published in the Pennsylvania Bulletin on December 10, 1983. Pursuant to the Pennsylvania Sewage Facilities Act, Pa. Stat. Ann. tit. 35, §§ 750.1-750.20 (Purdon), the Commonwealth's Department of Environmental Resources approved the Borough's revision to its plan and published notice of its approval in the Pennsylvania Bulletin on January 14, 1984. (Juris. State., A-17)

An appeal from an action taken by the Department of Environmental Resources is to be filed with the Commonwealth's Environmental Hearing Board within thirty days from the date when notice of the action appears in the Pennsylvania Bulletin. Pa. Admin. Code tit. 25, § 21.52 (Fry 1987 Supp.) Notwithstanding this rule, upon written request and for good cause shown the

Environmental Hearing Board may grant leave to appeal nunc pro tunc if an untimely appeal is taken. Id. at § 21.53.

Wyant did not take a timely appeal to the Hearing Board; however, eleven months after the Department's decision to approve the Borough's revision was published, he filed a request for leave to appeal nunc pro tunc. (Juris. State., A-54) The Borough moved to dismiss the appeal and the Hearing Board granted the motion, finding that Wyant had failed to satisfy the state law standards governing when out-of-time appeals are permitted. (Juris. State., A-4 -- A-9) In particular, the Board stated that Wyant had failed to cite any reasons why his appeal should have been allowed, much

less satisfy the required standards of fraud or a breakdown in the agency's operations. (Juris. State., A-6 -- A-7) Commonwealth Court affirmed, concluding that good cause had not been shown and rejecting Wyant's contention that personal notice of the Department's approval is required before a Department decision becomes effective. (Juris. State., A-16 -- A-20) The court agreed with the Hearing Board that Wyant had not met the state law standards for granting appeals nunc pro tunc, and found that public notice was sufficient under these circumstances because Wyant's interest, at this point in the process at least, was no greater than that of the rest of the general public. (Juris. State., A-19 -- A-20)

Wyant then filed a petition for allowance of appeal with the Supreme Court of Pennsylvania (Juris. Stat., A-103) seeking discretionary review of Commonwealth Court's decision.[1] His questions presented for review by the State Supreme Court, however, failed to challenge the constitutionality of a state statute. (Juris. State., A-104 -- A-106) On May 27, 1987, the State Supreme Court denied the petition for allowance of appeal per curiam. (Juris. State., A-3)

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[1]The Judicial Code of Pennsylvania provides that where, as here, a matter does not commence in the Commonwealth Court as an original matter, but rather is an appeal from a trial court or an administrative agency, an appeal to the State Supreme Court is by permission not as of right. 42 Pa. Cons. Stat. § 724.

ARGUMENT

I. WYANT'S FAILURE TO PRESERVE THE FEDERAL QUESTION IN THE STATE SUPREME COURT WARRANTS DISMISSAL OF HIS APPEAL.

Under Section 1257(2) of the Judicial Code, 28 U.S.C. § 1257(2), an appeal to this Court from a decision of a State Supreme Court lies only where there is a challenge to the constitutionality of a State statute. Addington v. Texas, 441 U.S. 418, 422 (1979). The issue of the constitutionality of the State statute, moreover, must be preserved in the state courts below in order for this Court to hear the appeal. Beck v. Washington, 369 U.S. 541, 549-53 (1962); Wolfe v. North Carolina, 364 U.S. 177, 196 (1960). See also Illinois v. Gates, 462 U.S. 213, 218-20 (1983) (certiorari).

In his Jurisdictional Statement, Wyant candidly admits that he "refrained from explicitly attacking" a state statute or regulation in the courts below. (Juris. State., 31) Given this concession, there is no need for the Court to hear further argument. Even assuming, however, that Wyant had presented such a challenge to the Commonwealth Court of Pennsylvania, it is apparent that the questions he presented for review by the State Supreme Court failed to preserve an attack on a Pennsylvania statute. (Juris. State., A-104)

Under Pennsylvania law, a failure to set forth a question in the petition for allowance of appeal constitutes a waiver of that allegation of error. See Commonwealth v. Stanley,

498 Pa. 326, 331 n. 1, 446 A.2d 583, 585 n. 1 (1982); Abramson v. Commonwealth, Public Utility Commission, 489 Pa. 267, 270 n. 5, 414 A.2d 60, 62 n. 5 (1980). Thus, Wyant failed to follow an established state practice designed to further the legitimate purpose of promoting the orderly disposition of appeals; this failure constitutes an adequate and independent state ground of decision warranting dismissal of the appeal. James v. Kentucky, 466 U.S. 341, 348 (1984); Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978).[2]

For these reasons, the appeal should be dismissed.

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[2]The decision in Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978)(per curiam), does not require a different result. There, the Court vacated a judgment of the Supreme Court

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II. PUBLIC NOTICE OF A GOVERNMENTAL DECISION TO APPROVE AN AMENDMENT TO MUNICIPALITY'S SEWAGE MANAGEMENT PLAN SATISFIES THE NOTICE REQUIRED BY PROCEDURAL DUE PROCESS.

Appellant contends that, although he was not an actual party, he was a person who "should have been made a party" to the administrative proceedings before the Borough adopted, and the Commonwealth approved, a revision to the municipality's official sewage management plan. (Juris. State. at 32) Based on

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(FOOTNOTE CONTINUED)

of Pennsylvania and remanded for further proceedings since the record did not disclose whether the State Supreme Court had passed on appellants' claim of a denial of their federal constitutional rights or whether it instead had denied the writ of mandamus on an adequate and independent state ground. Here, of course, appellant simply failed to present a claim of an unconstitutional state statute to the State Supreme Court.

this alleged interest, Wyant submits that the lack of direct personal notice to him of the Department's decision to approve the revision renders the approval constitutionally flawed. Even assuming that this argument challenges the constitutionality of a state statute, and was preserved below, it nevertheless fails to warrant further review by the Court.

Wyant's sole basis for contending that due process was lacking is his argument that notice of the Department's decision was inadequate. Due process, of course, is flexible and there is no universal procedure applicable to all situations which is mandated by the Constitution. Goss v. Lopez, 419 U.S. 565, 578 (1975); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). The Court repeatedly has emphasized that the

due process inquiry is guided by the interests at stake and the practicalities involved. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543-46 (1985); Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Goss v. Lopez, 419 U.S. at 578.

To be sure, notice is an important element of the due process inquiry. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). But the Court specifically has refrained from adopting a universal model applicable to all proceedings. Instead, the Court has required simply that, as a threshold matter, adequate notice is that which is "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action...." Id. at 314. In assessing

what is reasonable under the circumstances, moreover, the Court in Mullane pointed to the "practicalities and peculiarities" of the case as guideposts. Id. at 314-15.

With thorough and frequent investigations--at certainly great administrative cost--the Department of Environmental Resources possibly could reach more persons with notice of its intent to approve a revision to a municipality's sewage plan than that afforded by public notice. Given the large number of interests, both present and future, which may be affected and the number of approvals required by the Department in a state the size of Pennsylvania, however, publication in the state's official legal gazette represents a reasonable accommodation of

the interests at stake. This is not a situation where, for example, the notice is published only in a local newspaper of restricted circulation. Cf. Mullane, supra, 339 U.S. at 315. The Pennsylvania Bulletin is the official publication of the Commonwealth for notices, regulations and the like, and state law expressly makes such notice sufficient for state law purposes. Pa. Stat. Ann. tit. 45, §§ 904, 906 (Purdon). Nor is this a situation where, for example, there is an imminent termination of life-sustaining assistance or home utilities, where greater administrative efforts may be necessary given the nature of the private interest at stake.[3] Cf. Memphis

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[3]As the record demonstrates, Wyant has pursued appeals from the Department's approval of the Borough's pollution discharge and water quality management

(FOOTNOTE CONTINUED ON NEXT PAGE)

Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978); Goldberg v. Kelly, 397 U.S. 254 (1970). Wyant can make no showing that, at the point the decision was made to approve the Borough's revision, his interest was different from any other member of the public.

In short, as Wyant himself recognizes, "this case involves straightforward and well-settled federal principles of procedural due process..." (Juris. State., 30), which do not require further treatment by the Court under the circumstances presented here.

(FOOTNOTE CONTINUED)

permits (Juris. State., 19, A-53) which remain under consideration. In addition, as the Borough advised the Court (Br. p. 15), it is required to proceed through condemnation proceedings under state law before it could affect Wyant's property. See Pa. Stat. Ann. tit. 26, § 1-406 (Purdon). Thus, there is no imminent deprivation without adequate process available for Wyant to challenge the Borough's decision to take or otherwise affect his land.

CONCLUSION

For the foregoing reasons, the appeal docketed by Gerald Wyant should be dismissed. In the alternative, the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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